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Supreme Court, U.S.
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No. 04-473

IN THE

Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a prosecutor speak on a matter of public concern under *Connick v. Myers*, 461 U.S. 138 (1983), when, through a series of communications made both within and outside the District Attorney's office where he is employed, he brings to light and expresses concern that a deputy sheriff may have falsified an affidavit to procure a search warrant in a case under the prosecutor's supervision?

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STATUTE

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Richard Ceballos, a Deputy District Attorney in the Los Angeles County District Attorney's Office, reported to his immediate supervisor, his supervisor's superior, his colleagues in the District Attorney's Office, and the Sheriff's Department his determination that a Deputy Sheriff had falsified an affidavit used to obtain a search warrant in a criminal matter under Ceballos's supervision. Ceballos subsequently shared his determination with the defense counsel in the underlying case in accordance with *Brady v. Maryland*, 373 U.S. 83 (1963), and testified pursuant to a defense subpoena at a hearing challenging the basis of the search warrant. In response, his supervisors retaliated against him.

The U.S. Court of Appeals for the Ninth Circuit ruled that the individual defendants were not entitled to summary judgment on qualified immunity grounds because, viewing the facts in the light most favorable to Ceballos, his speech was protected by the First Amendment, his constitutional right was clearly established, and the officials' acts were not objectively reasonable. The panel accordingly remanded the case for further proceedings. Petitioners seek review of only one aspect of that ruling—the court of appeals' determination that Ceballos's speech addressed a matter of public concern.

Petitioners repeatedly assert that the alleged retaliation occurred in response to Ceballos's preparation of a single "routine" disposition memorandum shared with only two supervisors. They argue that because Ceballos's speech bringing to light the alleged misconduct and breach of public trust by the Sheriff's Department was related to his job and communicated in the course of his job duties, his speech was not a matter of "public concern" under *Connick v. Myers*, 461 U.S. 138 (1983). They claim that because it was expressed as part of his job, Ceballos's speech "by definition, cannot be characterized as 'citizen speech,'" and therefore deserves no First Amendment protection. Pet. 13.

As discussed below, petitioners are wrong on the facts and wrong on the law. Ceballos did not communicate his views

about the Deputy Sheriff's allegedly false affidavit solely through a single memorandum to two supervisors; he expressed his concerns to his colleagues in the District Attorney's office, to his supervisors (both orally and in writing), to the Deputy Sheriff who authored the affidavit, in a meeting with his supervisors and several representatives of the Sheriff's Department, to the defense counsel in the underlying case, in a court hearing, and later, while retaliation was already underway, in a meeting with the Mexican American Bar Association. Far from being "routine," Ceballos's repeated expressions of concern that the Sheriff's Department had misrepresented the facts—if not committed perjury—in conducting a criminal investigation were quite extraordinary. In challenging the lawfulness of the conduct of the Sheriff's Department, Ceballos's statements were speech that indisputably addressed a matter in which the public's interest is at its peak. The community's interest in such reports of misconduct was all the more acute in Los Angeles, where the police department had been racked by the "Rampart" scandal exposing police misconduct only six months before Ceballos wrote his March 2000 memoranda.

Even if the facts were as petitioners claim, there would be no basis for further review. Not only did the Ninth Circuit faithfully apply this Court's precedents, but, contrary to petitioners' assertion, its decision is consistent with that of every other court of appeals deciding an analogous case. No circuit has adopted the per se approach urged by petitioners, and none would have held that Ceballos's speech failed to meet *Connick*'s threshold. Thus, this case would serve as a poor vehicle for probing any differences in treatment of the *Connick* public concern gatekeeping test.

Finally, petitioners and their amicus maintain that unless this Court establishes their per se rule, the First Amendment protection of job-related public employee speech on matters of public concern "will have a crippling effect" on the management of public agencies. The circuits already recognize

that such speech is protected by the First Amendment, and no management crisis has materialized. Equally important, petitioners fail to consider the adverse consequences for free expression and self-governance that would accompany a per se rule, which would effectively strip public employees of their right—indeed, duty—to bring to light official misconduct unless they run every time to the media rather than discreetly pursue internal channels of communication. The perverse incentives of the rule petitioners urge are so obvious that there is no need for further review by this Court.

STATEMENT

The facts, viewed in the light most favorable to the respondent, are as follows. Richard Ceballos has served as a Deputy District Attorney in Los Angeles since 1989. In 1997 or 1998, he was assigned to the Pomona Branch of the District Attorney's Office and about a year later was promoted to calendar deputy, a prestigious position affording him supervisory responsibilities over more junior Deputy District Attorneys. Pet. App. 2-3; Excerpts of Record ("ER") 177-78. In early 2000, a lawyer representing one of the defendants in *People v. Cuskey*, a case then being prosecuted by the District Attorney's Office under Ceballos's supervision, approached Ceballos and asked him to investigate whether one of the arresting Deputy Sheriffs lied in an affidavit he swore out to obtain a search warrant. Pet. App. 3; ER 180-82. Ceballos agreed to look into it. After reviewing the evidence, visiting the crime scene, and discussing the matter with colleagues in his office, and after a meeting with his direct supervisor, Carol Najera, and her superior, Head Deputy District Attorney Frank Sunstedt, Ceballos determined that the affidavit was indeed false and misleading. Ceballos's colleagues and supervisors agreed that the validity of the warrant was questionable. Pet. App. 3; ER 182-89.

On March 2, 2000, Ceballos provided Sunstedt a memorandum, or disposition report, discussing his assessment

that the Deputy Sheriff had relied on inaccurate and misleading information provided by other officers and falsified his affidavit; Ceballos recommended that the case be dismissed. Pet. App. 3; ER 365-66. The memorandum minced no words and accused the Deputy Sheriff of having committed perjury. ER 546-49. It is undisputed that Ceballos charged misconduct on the part of the affiant and other law enforcement officers to bring their wrongdoing to light and not to further some private interest or grievance. *See* Pet. App. 19. Sunstedt treated the memorandum as exceptional, as if Ceballos's accusations raised a "novel issue." ER 210. He directed Ceballos to revise the memorandum and make it less accusatory of the Deputy Sheriff, particularly because the memorandum was to be shared with the Sheriff's Department. Pet. App. 3; ER 60, 190, 546-49. Ceballos complied and revised the memorandum, but it continued to reflect his conclusions that the Deputy Sheriff's characterizations of the crime scene in his affidavit were "grossly inaccurate," "clearly misleading," omitted key facts, and quite possibly, were wholly fabricated. ER 742-44.

On March 6, 2000, Ceballos wrote another memorandum to Sunstedt reporting a conversation Ceballos had had with the Deputy Sheriff, in which Ceballos told the Deputy that statements in his affidavit appeared to be "grossly inaccurate." ER 745. The March 2 memorandum, if not both memoranda, were faxed to the Sheriff's Department, ER 179-80, 755, and a meeting was held on March 9, 2000, attended by several representatives from the Sheriff's Department, Sunstedt, Najera, Ceballos, and the Deputy District Attorney originally assigned to the *Cuskey* case. Pet. App. 3; ER 179. Everyone at the meeting had a copy of the March 2 memorandum. R. 43, Ceballos Depo. Tr. 97. During that meeting, representatives from the Sheriff's Department verbally attacked Ceballos, accused him of acting like a "public defender," and demanded that he be removed from the case. *Id.* at 97-99. The captain in the Sheriff's Department also wanted the case to go forward because he was fearful that one of the defendants would file a

lawsuit against the Department. ER 194.

Following the meeting with the Sheriff's Department, Sunstedt decided to proceed with the case pending the outcome of a defense motion challenging the basis for the search warrant. Pet. App. 3-4; ER 64, 552-54. Ceballos informed defense counsel that he believed the affidavit contained false statements, and the defense subpoenaed him to testify at the hearing on their motion. Pet. App. 4. Ceballos told Carol Najera, his supervisor, that pursuant to *Brady v. Maryland*, he was required to turn over to the defense the two memoranda he had written expressing his opinion regarding the illegality of the search warrant. *Id.* According to Ceballos, Najera instructed him to write a new memorandum that contained only the statements of the Deputy Sheriff who had prepared the affidavit and to omit all other information; Najera also made a veiled threat of retaliation if Ceballos testified candidly at the defense hearing. ER 195-97, 738-39, 757; R. 43, Ceballos Depo. Tr. 120-22. Ceballos refused to write a new memorandum, but agreed to provide copies of his memoranda to the defense with work product redacted. ER 195, 738; R. 43, Ceballos Depo. Tr. 120-22, Najera Depo. Tr. 126-28. Ceballos later testified at the hearing on defendants' motion challenging the search warrant, but as a result of objections by the prosecution, Ceballos's testimony was restricted. The defense motion was denied. Pet. App. 4.

Soon after, the District Attorney's Office took several retaliatory actions against Ceballos, including demoting and transferring him to an inconvenient branch of the office, reassigning one of his murder cases to a junior colleague with no murder trial experience, refusing to assign him additional murder cases, and denying him a promotion. Pet. App. 4-5; ER 171-78, 199-208, 378-79, 736, 740. Ceballos filed a grievance challenging these various actions. ER 735-52. While his grievance was pending, he spoke out at the Mexican-American Bar Association ("MABA") about the Sheriff Department's alleged wrongdoing in the *Cuskey* case, the District Attorney's

lack of a policy for dealing with cases in which prosecutors suspect police misconduct, and the retaliation against him. The president of MABA called then-District Attorney Gil Garcetti to discuss MABA's concerns about Ceballos's allegations. R. 43, Ceballos Depo. Tr. 178, Declaration of James E. Blancarte. Only a few days later, the District Attorney's Office denied Ceballos's grievance. Ceballos claims that his grievance was denied at least in part because he spoke to MABA. *Id.*, Ceballos Tr. 177-78; ER 302-03 ¶ 22. Subsequently, Ceballos filed a § 1983 action against his supervisors, the District Attorney, and Los Angeles County challenging the retaliation on First Amendment and other grounds.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISIONS, AND THERE IS NO CIRCUIT SPLIT.

A. This Court's Precedents

Petitioners attempt to manufacture a false dichotomy between "citizen speech" on matters of public concern, which would meet the *Connick* threshold, and "employee speech" on matters of public concern, which would not. The Court drew no such distinction in *Connick* or any other case. In *Connick*, the Court explained that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters *only of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

461 U.S. at 147 (emphasis added). It is only "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community," that

government officials "enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146; *see also City of San Diego v. Roe*, 125 S. Ct. 521, 525-26 (2004) ("[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."). The Court in *Connick* did *not* suggest that the availability of First Amendment protection for speech on matters of critical public concern (such as abuse of authority by local law enforcement) turns on a characterization of whether the employee spoke "as a citizen," "as an employee," or both. To the contrary, the Court emphasized that if the plaintiff in *Connick* had sought "to bring to light actual or potential wrongdoing or breach of public trust" by the District Attorney instead of "gather[ing] ammunition for another round of controversy with her superiors," then more of her information gathering would have addressed a matter of public concern, even though her expression plainly would still have been job-related. *Connick*, 461 U.S. at 148.

Since at least its decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968), this Court has recognized that the right of a public employee to speak out on matters of public concern is so integral to the employee's role as a citizen and the community's interest in self-governance that the government must make a substantial showing of disruption before it may punish such speech. "[A] government employee, *like any citizen*, may have a strong, legitimate interest in speaking out on public matters." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion) (emphasis added). Accordingly, the Court has ruled "that statements by public officials on matters of public concern must be accorded First Amendment protection" unless outweighed by the state's interest as an employer in promoting efficiency or avoiding disruption. *Pickering*, 391 U.S. at 574; *see also Connick*, 461 U.S. at 154 ("[T]he First Amendment's primary aim is the full

protection of speech upon issues of public concern . . . ."); *accord Board of County Comm'rs v. Umbehr,* 518 U.S. 668, 675 (1996); *Rankin v. McPherson,* 483 U.S. 378, 384 (1987).

Petitioners argue that in both this case and its earlier decision in *Roth v. Veteran's Administration,* 856 F.2d 1401 (9th Cir. 1988), the Ninth Circuit gave short shrift to what they claim is an independent "citizen speech" component of the *Connick* threshold that a public employee must satisfy before he can compel his employer to justify a retaliatory employment action. Pet. 11-13. Petitioners do not define "citizen speech" and do not articulate what they believe is missing that would convert Ceballos's reports of law enforcement misconduct from (unprotected) employee speech to (protected) citizen speech. Petitioners have found it easier to say what they believe "citizen speech" is *not*—either speech that is related to a public employee's job or speech that is made in the course of performing the employee's job duties. Pet. 11, 13.[1]

But if Ceballos's speech addressed a topic of public concern, which evidently petitioners do not dispute, Pet. i, 4, then the fact that the speech was job-related does not, under this Court's cases, divest that speech of First Amendment protection. Not only has this Court extended constitutional protection to speech addressing topics of public concern when the speech was both related to the public employee's job and communicated in the workplace, *see, e.g., Givhan v. Western Line Consolidated School Dist.,* 439 U.S. 410, 413-16 (1979) (teacher's communications solely to school principal challenging school policies and practices believed to be racially discriminatory were protected speech); *accord Connick,* 461

[1] It is unclear whether petitioners are taking the position that *all* "purely job-related speech" by public employees—whether or not on topics of public concern—fails to meet the *Connick* threshold, *see, e.g.,* Pet. i, 9 n.3, 11, 18, or whether their view is that only public employees' speech (especially "routine" speech) performed in the course of their duties is unprotected. *See, e.g., id.* at 4, 11 & n.4, 13.

U.S. at 148 n.8 (teacher in *Givhan* spoke out "as a citizen" on "a matter inherently of public concern"), but the Court has assumed that protected employee speech on matters of public concern would *generally* be job-related.

As the Court observed in *United States v. National Treasury Employees Union,* 513 U.S. 454 (1995) ("*NTEU*"), its decision in *Rankin v. McPherson, supra,* in which a public employee made a remark about hoping "they get him" the next time an attempt was made on President Reagan's life, was, at the time of *NTEU*, "the only case" in which the Court had applied the *Pickering* balance "to speech whose content had nothing to do with the workplace." *Id.* at 466 n.10. And, as it reiterated only last month, the Court "has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment." *Roe,* 125 S. Ct. at 523. Although the Court in *Roe* distinguished the category of protected *job-related* speech from expression by government employees on topics "unrelated to their employment," the Court still recognized that *both* categories are protected absent a strong governmental justification. *Id.* at 523-24.[2]

Furthermore, if petitioners were right, and a nexus between a public employee's speech and his employment duties were sufficient to deny the speech First Amendment protection at the gate, the entire nature of the *Pickering* balancing would be upset. For example, in *Rankin,* the Court instructed that "the

[2] In *NTEU,* 513 U.S. at 465, the Court discussed the lack of "relevance to their employment" of most employee speech barred by the honoraria ban in the course of explaining why the government's interest in the ban was so weak, as the barred speech had no "adverse impact on the efficiency of the offices in which they work." The Court never suggested that if the banned speech had been job-related, no *Pickering* balance would have been necessary because the speech per se would not have met *Connick*'s public concern threshold.

manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." 483 U.S. at 388; *accord Connick*, 461 U.S. at 152-53. In balancing the employee's and employer's competing interests, a court is to consider "the responsibilities of the employee within the agency," *Rankin*, 483 U.S. at 390, and whether the speech "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 388. That the impact of the speech on the employee's job duties is evaluated under the *Pickering* balance *presupposes* that such speech will often be related to those duties. *See, e.g., Lee v. Nicholl*, 197 F.3d 1291, 1296 n.1 (10th Cir. 1999) ("overly emphasizing the forum of speech used by the employee threatens to upset the *Pickering* balance").[3]

The Ninth Circuit's approach here is fully consistent with this Court's precedents. Petitioners' insistence that the court of appeals focuses on the content of public employees' speech to the exclusion of other considerations is a distortion. *See* Pet. 12-13. Neither Ceballos nor the Ninth Circuit denies that, as this Court has said, *see Connick*, 461 U.S. at 147-48, in

[3] Petitioners' contention that public employees have no personal interest in the content of their job-related speech because their speech is actually the government's, *see* Pet. 11 n.4, 14 n.5; *see also* Pet. App. 41-46 (O'Scannlain, J., specially concurring), and the amicus's related argument that the court of appeals' approach interferes with the government's ability to regulate speech made on its own behalf, *see* Amicus Br. 7-9, are inexplicable. Ceballos's March 2000 memoranda expressed his own personal views regarding the conduct of the Sheriff's Department and made his own personal recommendation, for Sunstedt to take or leave, regarding the proper disposition of the criminal case at issue. *See Bonds v. Milwaukee County*, 207 F.3d 969, 980-81 (7th Cir. 2000). Case law on the government's right to control speech *made on its own behalf*, such as at a press conference or in a legal brief, has no bearing on whether an *employee himself* speaks on a matter of public concern when he reports official misconduct to his supervisor.

addition to its content, the form and context of public employee speech are relevant in gauging whether the punished expression actually involved a matter of public concern. *See* Pet. App. 8. In *Roth v. Veteran's Administration*, a case on which the court of appeals relied here, *see id.* at 10-12, the Ninth Circuit explicitly denied that all speech on such topics of public interest as misuse of public funds, wastefulness, and government inefficiency "*automatically* deserves protection." 856 F.2d 1401, 1405 (9th Cir. 1988) (emphasis added). Instead, *Roth* stressed that it was important to examine "the context" of the speech, particularly "the point" of the speech, to judge whether it "'seek[s] to bring to light actual or potential wrongdoing or breach of public trust,' which warrants protection," or is "speech that merely reflects one employee's dissatisfaction with her employment." *Id.* (quoting *Connick*, 461 U.S. at 148). Not only does this analysis closely track this Court's direction in *Connick*, but it mirrors the basic approach of the other circuits, to which we now turn.

B. Circuit Cases

There is an overwhelming consensus in the courts of appeals that whether law enforcement agencies are properly and lawfully performing their responsibilities is a core matter of public concern. As the Fifth Circuit put it: "Exposure of official misconduct, especially within the police department, is generally of great consequence to the public." *Branton v. City of Dallas*, 272 F.3d 730, 740 (5th Cir. 2001); *see also Guilloty Perez v. Pierluisi*, 339 F.3d 43, 52 (1st Cir. 2003); *Delgado v. Jones*, 282 F.3d 511, 517 (7th Cir. 2002); *Baldassare v. New Jersey*, 250 F.3d 188, 196-97 (3d Cir. 2001); *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1292 (11th Cir. 2000). Ceballos's speech seeking to expose the Sheriff Department's alleged falsification of an affidavit to procure a search warrant falls squarely within this line of cases.

Petitioners assert, however, that the "current legal landscape" is rife with "conflict and confusion," Pet. 17, that

the Ninth Circuit's approach to public employee speech is contrary to the analysis adopted by a number of other circuits, *id.* at 14-17, and that the opinions even *within* several of these circuits are not internally consistent. *Id.* at 17. What petitioners cite as irreconcilable opinions within the circuits, however, are simply decisions that distinguish cases based on factual differences. As the Ninth Circuit noted, although other circuits have held in some instances that public employees' speech pursuant to job-related duties did not involve matters of public concern, "it was ordinarily because the speech at issue primarily involved either personal grievances or the 'routine discharge of assigned functions, where there is no suggestion of public motivation,'" Pet. App. 16 n.7 (citation omitted)—neither of which is applicable here. No court of appeals has adopted the per se approach petitioners urge, and none of the cases in these other circuits is at odds with the Ninth Circuit's decision.

In *Gonzalez v. City of Chicago,* 239 F.3d 939 (7th Cir. 2001), on which petitioners heavily rely, the Seventh Circuit held that a police officer's official reports discussing police misconduct, pursuant to his duties to investigate alleged misconduct, did not address matters of public concern because they addressed primarily "internal office affairs" and contained "simply a summary of his findings following his official investigations." *Id.* at 941-42. The Seventh Circuit has gone to great pains to explain why *Gonzalez* is not controlling in other situations much closer to Ceballos's case. In *Delgado v. Jones,* 282 F.3d 511 (7th Cir. 2002), for example, the court found that a police detective's memorandum to his superior about criminal activities involving a close relative of an elected official, who, in turn, was a close personal friend of the police chief, addressed a matter of public concern. Focusing on the "point of the speech," the Seventh Circuit reasoned that a communication by a law enforcement officer containing information essential to an investigation of serious criminal activity involved a matter of public concern and that the

communications would not have benefited the plaintiff personally. *Id.* at 517-18. The court rejected the defendant's proposed per se approach, which relied on *Gonzalez,* that communications that are part of an employee's regular job duties are not matters of public concern, and limited *Gonzalez* "to routine discharge of assigned functions, where there is no suggestion of public motivation." *Id.* at 519; *see also Delgado v. Jones,* 95 Fed. Appx. 185 (7th Cir.) (reaffirming earlier ruling), *cert. denied.,* 125 S. Ct. 346 (2004); *Cygan v. Wisconsin Dep't of Corrections,* 388 F.3d 1092, 1100-01 (7th Cir. 2004); *Bonds,* 207 F.3d at 980 ("[W]e commonly have found speech by public employees spoken pursuant to their employment duties to constitute speech on a public concern."); *Hulbert v. Wilhelm,* 120 F.3d 648, 653-54 (7th Cir. 1997).

Here, as in *Delgado,* there was nothing "rote" or "routine" about Ceballos's March 2000 memoranda and surrounding communications. More to the point, there is nothing in the Seventh Circuit's rulings that remotely endorses the notion that the First Amendment excludes speech made in the course of a public employee's job duties.

So, too, in *Thomson v. Scheid,* 977 F.2d 1017 (6th Cir. 1992), cited by petitioners, the Sixth Circuit held that the plaintiff's conversations, during an investigation of possible fraud, regarding the way the investigation was being conducted and departmental procedures, concerned "matters of internal department policy," rather than matters of public concern. *Id.* at 1021. But in subsequent cases, the Sixth Circuit has repeatedly rejected public employers' arguments, relying on *Thomson,* that an employee who speaks out on a matter of public concern during the course of performing employment duties is not entitled to First Amendment protection. *See, e.g., Rodgers v. Banks,* 344 F.3d 587, 597-99 (6th Cir. 2003); *Taylor v. Keith,* 338 F.3d 639, 644-46 (6th Cir. 2003); *Williams v. Kentucky,* 24 F.3d 1526, 1535 (6th Cir. 1994). For instance, in *Taylor,* the court held, focusing on "the point of the speech in question," 338 F.3d at 645 (emphasis omitted), that a police

officer's submission of a *required* report in which he charged another officer with excessive use of force addressed a matter of public concern because his speech was intended to communicate the potential wrongdoing of a fellow officer. *See id.* at 645-46.

Likewise, in *Koch v. City of Hutchinson,* 847 F.2d 1436 (10th Cir. 1988) (en banc), also cited by petitioners, the Tenth Circuit, relying on the content, form, and context of the speech at issue, ruled that a fire marshal's official report regarding the cause of a fatal fire did not address a matter of public concern because it was "simply one of many routine official reports," *id.* at 1447, and because there was no evidence that the plaintiff's report "was in any way motivated or inspired by . . . improprieties or by the desire to expose those improprieties." *Id.* at 1448. In that very case, however, the Tenth Circuit *rejected* the city's argument that communications made in the course of an employee's official duties are per se exempt from First Amendment protection. *Id.* at 1442. Accordingly, in subsequent decisions analogous to the Ninth Circuit's here, the Tenth Circuit has held that public employee speech made in the course of employment involved matters of public concern. In *Dill v. City of Edmond,* 155 F.3d 1193 (10th Cir. 1998), for example, a police officer wrote a letter to the then-chief of police stating that he was aware of exculpatory evidence in a murder case that he wanted to bring to the attention of the district attorney. The court held that because the officer's speech concerned possible wrongdoing by his fellow police officers, his statements addressed a matter of public concern. *Id.* at 1202. Distinguishing *Koch,* the Tenth Circuit emphasized that the officer's expression involved more than a routine summary report and was conveyed "to bring to light the possible mishandling of a murder investigation." *Id.*; *see also Lee,* 197 F.3d at 1295.

This same pattern has played out in the other circuits as well. In decisions cited by petitioners, the courts have made fact-specific judgments that particular public employee speech

did not address matters of public concern, either because the speech reflected a routine discharge of a job function and was not intended to bring wrongdoing to light, or because the expression focused on personal grievances or internal office policy. These same circuits have decided many other cases, however, with facts more apposite to those here, in favor of First Amendment protection—often explicitly distinguishing the decisions on which petitioners rely. No circuit has adopted the per se exemption from First Amendment protection for job-related employee speech urged by petitioners. In addition to the decisions discussed above, see the following case law from other circuits from which petitioners have cited decisions:

- **Fourth Circuit:** *Compare Urofsky v. Gilmore,* 216 F.3d 401, 406-09 (4th Cir. 2000) (en banc) (holding that state statute prohibiting state employees from accessing sexually explicit material on state computers did not implicate matters of public concern, with no public employee speech exposing government misconduct involved), *with Mansoor v. Trank,* 319 F.3d 133, 138 (4th Cir. 2003) (recognizing that "in fact, matters 'relating to your employment' clearly *can* encompass matters of public concern") (emphasis in original), *Robinson v. Balog,* 160 F.3d 183, 187-89 (4th Cir. 1998) (public employees who testified at public hearing and cooperated with federal investigators engaged in protected speech on matter of public concern, even though speech was obviously job-related), *and Mansoor v. County of Albermarle,* 124 F. Supp. 2d 367, 375-76 (W.D. Va. 2000) (*Urofsky* does not hold that a public employee may not speak as a citizen upon matters of public concern that also relate to his official duties).

- **5th Circuit**: *Compare Gillum v. City of Kerrville,* 3 F.3d 117, 121 (5th Cir. 1993) (police officer contesting his role in an internal investigation spoke as an employee embroiled in a personal employment dispute, not on a matter of public concern), *and Terrell v. University of Texas Sys. Police,* 792 F.2d 1360, 1363 (5th Cir. 1986) (police officer's notes

regarding police chief's performance, which plaintiff made no effort to communicate to the public, were "tied to a personal employment dispute"), *with Kennedy v. Tangipahoa Parish Library Bd. of Control,* 224 F.3d 359, 367-75 (5th Cir. 2000) (letter from library supervisor to director regarding need for greater library security measures addressed matter of public concern, even though letter was written in employee's official capacity, distinguishing *Gillum* and *Terrell*), *Branton,* 272 F.3d at 739-41 (internal affairs investigative officer spoke on a matter of public concern when, pursuant to her job responsibilities, she reported false testimony to a hearing officer in a police disciplinary case she investigated), *Thompson v. City of Starkville,* 901 F.2d 456, 464- 67 (5th Cir. 1990) (police officer's written complaints about improper promotions and other misconduct addressed matter of public concern because he brought misbehavior to light, distinguishing *Terrell*), *and Wilson v. UT Health Center,* 973 F.2d 1263, 1269-70 (5th Cir. 1992) (university police officer's reports of sexual harassment within the police force involved matter of public concern even though officer acknowledged a duty to report sexual harassment, distinguishing *Terrell*).

- **Eighth Circuit:** *Compare Buazard v. Meridith,* 172 F.3d 546, 548-49 (8th Cir. 1999) (police officer's statements about his conversations with witnesses and fired police officers, and his refusal to change those statements at the request of the chief of police, did not involve matter of public concern because there was no indication that plaintiff was taking any action as a concerned citizen and the statements were entirely internal), *with Herts v. Smith,* 345 F.3d 581, 585-86 (8th Cir. 2003) (school district employee's testimony at a hearing regarding a desegregation case involving the school district was on a matter of public concern even though job-related, rejecting defendants' reliance on *Buazard*), *and Belk v. City of Eldon,* 228 F.3d 872, 879-80 (8th Cir. 2000) (city employee's memo to supervisor and conversation with alderman on inappropriate payment of employment benefits addressed matter of public

concern—the misuse of public funds and of her supervisor's public position—even though statements were "unquestionably related to her employment").

- **11th Circuit:** *Compare Morris v. Crow,* 142 F.3d 1379, 1382 (11th Cir. 1998) (deputy sheriff's routine report discussing auto accident investigation not on matter of public concern where nothing in the record indicated that plaintiff's speech "sought to bring to light any wrongdoing or to do more than accurately report an accident"), *with Oladeinde,* 230 F.3d at 1292 (police officers' speech alleging tampering with public records by fellow officers involved matter of public concern because "a core concern of the first amendment is the protection of the 'whistle-blower' attempting to expose government corruption," distinguishing *Morris*) (citation and internal quotation marks omitted), *and Fikes v. City of Daphne,* 79 F.3d 1079, 1084 (11th Cir. 1996) (police officer's report of misconduct arising out of a fellow officer's failure to terminate a high-speed chase that turned fatal raised a matter of public concern because plaintiff sought to expose police misconduct).[4]

Thus, none of the circuits has adopted the per se rule petitioners urge for job-related public employee speech, and none would find that a prosecutor's memorandum and other communications both inside and outside the district attorney's office that seek to expose unlawful conduct by the sheriff's department are exempt from First Amendment protection.

Petitioners point to statements in some circuit decisions in which the courts sought to determine whether the employee's

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[4] In addition, other circuits that petitioners do not mention agree that speech by public employees on topics of public concern satisfies the *Connick* threshold whether or not made in the course of the speaker's job responsibilities. *See, e.g., Baldassare v. New Jersey,* 250 F.3d 188, 196-97 (3d Cir. 2001); *Lewis v. Cowen,* 165 F.3d 154, 163-64 (2d Cir. 1999); *Fox v. District of Columbia,* 83 F.3d 1491, 1494 (D.C. Cir. 1996).

speech in a particular case "was made primarily in the plaintiff's role as citizen or primarily in his role as employee," Pet. 15-16, but these quotations are taken out of context. The citizen-employee formulation is simply a variation on the "point of the speech" inquiry; both are shorthand for whether, based on the speech's content, form, and context, a public employee is speaking on a matter of public concern. For example, in *Kennedy,* the Fifth Circuit ruled that a letter by a library supervisor to the director regarding the need for greater library security measures addressed a matter of public concern, even though it was part of the plaintiff's job to convey such concerns. The court noted that the citizen-employee test it had used in earlier cases produced the "identical conclusion" to the content-form-context test, in that here, the employee "clearly was not speaking upon matters only of personal interest, and indeed she spoke 'primarily in [her] role as citizen.'" *Kennedy,* 224 F.3d at 375; *accord Wilson,* 973 F.2d at 1269 (holding that police officer reporting sexual harassment within the police force spoke on a matter of public concern, even though she had a duty as a police officer to make the report, and thus spoke "both as a citizen and an employee").

The same has held true in the Fourth Circuit. In *Robinson v. Balog,* the court held that employees of a city solid waste division who testified at a public hearing and cooperated with federal investigators on job-related matters "sought to bring to light 'actual or potential wrongdoing or breach of public trust' on the part of government employees," 160 F.3d at 188 (citation omitted), and thus, they "spoke not in their 'capacity as . . . public employee[s],' but as 'citizen[s] upon matters of public concern.'" *Id.* at 189 (citations omitted).

In sum, there is no conflict on the questions presented, and review should therefore be denied.

II. PETITIONERS' PER SE APPROACH WOULD CURTAIL SPEECH ON ISSUES OF CRITICAL PUBLIC INTEREST AND CREATE PERVERSE INCENTIVES.

Petitioners and their amicus claim that if the First Amendment protects job-related public employee speech, the management of most, if not all, public agencies will be crippled. Pet. 18-20; Amicus Br. 3-5. Their fears have no basis and do not justify further review.

Petitioners not only seek to revisit the Court's analysis in *Connick,* in which the Court again "reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection," 461 U.S. at 145, but they are wrong on the likely effect of protecting job-related public employee speech on topics of public importance. The recognition that speech touches on a matter of public concern does not end the analysis; a court must then apply the *Pickering* balance to weigh the employee's and employer's competing interests. Thus, First Amendment protection is *not* "contingent" solely on whether "the speech . . . relates to an issue of public import," Pet. 19, but also depends upon a "full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *Connick,* 461 U.S. at 150, as well as "the manner, time, and place" in which the speech is made. *Id.* at 152-53; *see also Rankin,* 483 U.S. at 388. Tellingly, petitioners have not sought review of the Ninth Circuit's application of *Pickering* in this case. That no court of appeals in the country has seen fit to adopt a per se approach belies the alarm petitioners sound regarding the debilitating effects of the necessarily fact-based approach circuits across the country have been employing.

Petitioners never acknowledge that a per se rule exempting First Amendment protection for all public employee speech made in the course of the speaker's employment would unravel decades of jurisprudence by this Court recognizing both the

employee's interest as a citizen in speaking out on public matters—whether or not arising in the course of employment—and the community's equally powerful interest in hearing that speech. As this Court often has observed: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Connick,* 461 U.S. at 145 (citation omitted); *see also Umbehr,* 518 U.S. at 674 (government employees and contractors "are often in the best position to know what ails the agencies for which they work") (citation omitted). Thus, "[s]ilencing a public employee seeking to speak on a matter of public concern deprives a self-governing society of information that may be vital to informed decision-making." *Azzaro v. County of Allegheny,* 110 F.3d 968, 977 (3d Cir. 1997).

Not only would a per se rule denying protection for all job-related public employee speech curtail much speech by the very individuals in the best position to expose governmental misconduct, corruption, and inefficiency, but it would create perverse incentives. If employees had no First Amendment protection for reporting official wrongdoing when their reports were submitted pursuant to job responsibilities, then there is no doubt that employers would broaden their immunity by the simple expedient of adding to their employees' reporting duties. *See Wilson,* 973 F.2d at 1269 (rule that reports of sexual harassment made pursuant to plaintiff's duties are exempt from First Amendment protection "could ironically facilitate the suppression of speech through a requirement that the speech be made"); *accord Kennedy,* 224 F.3d at 370.

Likewise, as the Ninth Circuit here and many other courts of appeals have recognized, a ruling that public employee speech counts as "citizen speech" only if the employee "goes public" with his charges—a rule to which the logic of petitioners' position leads—creates an incentive for employees to take every accusation of wrongdoing directly to the press instead of discreetly pursuing internal channels. Pet. App. 13-14; *see also Lee,* 197 F.3d at 1296 n.1; *Hulbert,* 120 F.3d at

654 ("We find it hard . . . to believe that the county would have preferred his going immediately to the local newspapers and television stations with his information. Hulbert is, if anything, to be commended for attempting to go through the County's established internal channels . . . ."); *Fox,* 83 F.3d at 1494 ("An employee is not constitutionally penalized for making a sensitive report discreetly and without fanfare, or for failing to elicit the media's interest."); *Thompson,* 901 F.2d at 467 (denying protection for speech alerting superiors of grievances instead of the public "would mean that loyal employees seeking to rectify problems would lose constitutional protection for attempting to correct problems inhouse"). As this Court has recognized: "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." *Givhan,* 439 U.S. at 415-16; *accord Roe,* 125 S. Ct. at 526; *Rankin,* 483 U.S. at 387 n.11.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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